IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.02.2007

CORAM

THE HONOURABLE MR. JUSTICE J.A.K. SAMPATH KUMAR

A.S.NO.917 OF 1991 & TRANSFER APPEAL
NO.508 OF 1997

Chinna Karuppa Naicker ... Appellant in both the Appeals

Vs.

V. Karuppa Naicker ... Respondent
Appeal No.917/91

V. Karuppa Naicker @
Peria Karuppa Naicker ... Respondent in Tr.appeal No.508/97

A.S.No.917/1991 filed u/s 96 CPC against the judgment and decree dated 21.8.1991 in O.S.No.93/1985 on the file of the Sub Judge, Gobichettipalayam and Transfer Appeal.No.508/1997 filed u/s 96 CPC against the decree and judgment dated 21.8.1991 in O.S.No.184 of 1987 on the file of the Subordinate Judge of Gobichettipalayam.

For Appellant in both the Appeals : Mr. A.K. Kumaraswamy

For Respondent in both the Appeals : Mr. M. Duraiswami for Mr. T. Murugamanickkam

J U D G M E N T

These appeals arise out of a common judgment dated 21.8.1991 in O.S.Nos.93/1985 and 184 of 1987 of the Sub Court, Gobichettipalayam, in and by which the learned Sub Judge decreed the suit in part in O.S.No.93/1985 and decreed the suit in entirety in O.S.No.184/1987.

2. For convenience, the parties are referred as arrayed in O.S.No.93/1985. The plaintiff in O.S.No.93/1985 states as follows.

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The suit properties are joint family properties of the plaintiff and defendant. The defendant was the Kartha of the joint family and he was in management of the joint family. The defendant was in possession of joint family funds of Rs.50,000/-. The defendant is bound to render accounts for the said funds. The properties stand in the name of defendant are really joint family properties since they have been purchased from out of joint family funds. The plaintiff is entitled to a moiety in those properties. The consideration for those sales were provided from the joint family funds. The defendant has no independent means to purchase the property without the aid of the joint family funds. The plaintiff never denied the legitimate rights of the defendant in the entire joint family properties. The defendant abused his position as the kartha of the joint family, embezzled joint family funds, purchased valuable properties in his favour, committed breach of confidence and trust. The defendant is still in possession, and cultivating the lands only as a coparcener and for convenience sake. It is no longer possible for him to enjoy the entire joint family properties in common. He demanded for a partition even in 1977. But the defendant was postponing the same. The plaintiff demanded for partition during first week of Avani 1985 again, to which the defendant refused. Hence, the suit properties are to be divided into two equal shares with reference to good and bad soil and one such share is to be allotted to the plaintiff otherwise the plaintiff will be put to irreparable loss and damages which cannot be compensated in money value. Hence, the suit.

3. The defendant in O.S.No.93/1985 states as follows.

Item Nos. 3 and 4 of the suit properties are the separate and self acquired properties of the defendant, having been purchased after the family arrangements that took place immediately after the death of the father of the plaintiff and defendant. There was a disruption in the joint family status immediately after the death of the father Vedha Naicker. The defendant continues to be in exclusive possession and enjoyment of item Nos.3 and 4 of the suit properties adverse to that of the plaintiff openly, continuously to the knowledge of the entire world with an animus, asserting full and exclusive title over the same from the date of its respective purchase. The defendant alone is paying the kist to the Government. The plaintiff is barred from praying for the relief of partition, having kept quiet for more than 25 years and that too admitting the family partition. The plaintiff has not come to Court within the statutory period of 18 years from the date of his ouster and exclusion. Hence, the suit may be dismissed.

4. The plaintiff in O.S.No.184 of 1987 states as follows.

The plaintiff and defendant were living together enjoyed their joint family properties till the year 1975, In the year 1975,

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plaintiff and defendant entered into an oral partition in the presence of the panchayatdars viz., Velappagoundar, son of Thambi Goundar..1, Senniappa Gounder, son of Muthu Gounder..2 of Sennimalaigoundenoor and Chinnakutti naicker son of S. Karuppa Naicker of Moongilpatti, with a specific understanding that they would register the oral partition at a later stage as it would require some amount.

5. From the year 1985, the plaintiff and defendant are enjoying their respective shares as per the oral partition. The red marked portion in the plaint plan was allotted to the share of the plaintiff. The plaintiff is enjoying the suit property separately. He has paid kist to the Government. The plaintiff has supplied paddy to the Government for levy. He has raised sugarcane crop in the suit property and supplied to Sakthi Sugars.

6. The defendant wanted the plaintiff to lease out the suit property who has got his share adjoining the suit property. The plaintiff is not willing for such a request. Getting infuriated and taking advantage of the fact that there was no registered partition deed, the defendant is trying to interfere with the plaintiff's possession and enjoyment of the suit property, which the defendant is not entitled to. The defendant is bound by the oral partition. The plaintiff is not denying the defendant's right over the properties allotted to his share. Hence the suit.

7. The defendant in O.S.No.184/1987 states as follows.

Never there had been a partition among the plaintiff and defendant at any time. The notices and reply notices exchanged between the plaintiff and defendant would falsify and unfold the true colour of the theory and story of oral partition. The plaint plan is misleading and it is drawn to suit the convenience of the plaintiff. The plaintiff is not at all in possession and enjoyment of any of the portions in the suit fields. He is not at all in possession of even the red marked portions, which are in possession and enjoyment of this defendant ever since the death of his father. Hence, the suit may be dismissed.

8. Since the issues in both suit are one and the same, the suits were tried together and common judgment rendered. The plaintiff in O.S.No.93/1985 was examined as P.W.1. Exs.A1 to A8 were marked on the side of the plaintiff. The defendant in O.S.No.93/1985 was examined as D.W.1. M/s.Chenniappa Goundar and Nandal @ Karuppayal were examined as D.W.2 and D.W.3. Exs.B1 to B73 were marked on the side of the defendant to confirm the claim of the plaint.

9. The lower Court after analysing the evidence in depth found that the plaintiff is entitled to only a part of his claim

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and decreed accordingly in O.S.No.93/1985. The lower Court found that the plaintiff in O.S.No.184/1987 entitled to the suit claim and decreed the suit in entirety. The present appeals are filed by the plaintiff and defendant in O.S.No.93/1985 and 184/1987 respectively.

10. Heard the learned counsel for the appellant and defendant.

11. Upon hearing the rival claims, the points for consideration are as follows.

The point:-

1. Whether the plaintiff in O.S.No.448/1983 is entitled to the suit claim ?

2. Whether the defendant in O.S.No.93/1985 was in possession of joint family fund of Rs.50,000/- ?

3. Whether the plaintiff and defendant in O.S.No.93/1985 were in joint possession of the suit properties ?

4. Whether item Nos.3 and 4 of the suit property was purchased by the defendant in his name out of the joint family nucleus ?

5. Whether the plaintiff and defendant are enjoying their respective shares as per family arrangements ?

6. Whether the findings of the lower Court in O.S.No.93/1985 in dismissing the part of claim is in order ?

7. Whether the finding of the lower Court in decreeing the suit in O.S.No.448/1983 is in order ?

Point No.1:-

12. It is the specific case of the plaintiff that in respect of the suit property, the plaintiff and defendant were enjoying their respective properties independently from 1973 onwards. It is the admitted case of the plaintiff that himself and the defendant were enjoying their respective share in pursuance of oral partition of the year 1975.

13. Learned counsel for the respondent-defendant would contend that there is no oral partition with reference to property under dispute in the year 1975 and the said property continued to be in joint possession among them and therefore, the plaintiff is not entitled to the suit claim. At this juncture, it is useful to refer the notices exchanged between the plaintiff and the defendant. They are marked as A5 to A8. A5 is dated 26.4.1977 sent by the plaintiff to the defendant. Ex.A6 is the reply dated 16.5.1977 sent by the defendant to the plaintiff. Ex.A7 is dated 27.8.1977 sent by the plaintiff to defendant as rejoinder to Ex.A6. Ex.A8 is dated 7.9.1977 sent by the defendant to the plaintiff as a reply to A7.

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14. On a perusal of these exhibits, I find that there are no reference about oral partition of the year 1975 as alleged by the plaintiff. At the time of issuing the said notice and in reply notice 1977, the plaintiff stated that the suit properties are in joint possession of the plaintiff and defendant. In fact, the plaintiff informed the defendant about his intention to file a suit for partition of the suit property in case the defendant resisted his claim. In such view of the fact, it is apparent that the plaintiff is not in exclusive possession of the suit property as stated in the plaint, and they are in joint possession of the plaintiff and the defendant.

15. If that be so, the suit relief cannot be sustained. The lower Court failed to look into the case of the plaintiff of the year 1977 and wrongly came to the conclusion that the plaintiff is in exclusive possession of the suit property in the light of the oral partition in the year 1975, which is not correct on the ground reality and therefore, such finding is liable to be set aside and accordingly it is set aside. Hence, the point is answered against the plaintiff.

Point No.2:-

16. Though the plaintiff pleaded that the defendant was in possession of the joint family funds of Rs.50,000/-, he has not substantiated the same by letting any evidence. The plaintiff miserably failed to prove his case in this regard. Therefore, the lower Court has highly rightly negatived the claim of the plaintiff in this regard. Therefore, the finding of the lower Court does not require any interference. Hence, this point is answered against the plaintiff.

Point Nos.3 to 5:-

17. It is to be noted that the plaintiff and defendant are not in common enjoyment of the suit property jointly as they are not living together as joint family. There is no common mess for them. Admittedly, the plaintiff and defendant are in enjoyment of the respective portion of the suit property independently obtained by mutual arrangement. At this juncture, it is useful to refer the evidence of P.W.1. The evidence of P.W.1 reads as follows:-

> வழக்கு தாக்கல் செய்த பிறகு தனித்தனியாக சாகுபடி செய்து வருகிறோம். நானும் என் அண்ணனும் தனித்தனியாக சாப்பாடு சமைத்து கிட்டத்தட்ட 10 வருடங்களாக சாப்பிட்டு வருகிறோம். 1961–ல் நானும் என் அண்ணனும் தனித்தனியாக வசித்து வந்தோம். என் சகோதரிக்கு என் அப்பா சொத்தில் பாகம் ஏற்கனவே கொடுத்துவிட்டோம். கீவானி, பெருந்தலையூர், மூங்கில்பட்டி கிராமங்களில் உள்ள சொத்துக்களை என் தகப்பனார் இறந்தபிறகு பிரித்துக் கொண்டோம் என்றும் பாகக்கறார் மட்டும் ஆகவில்லை என்று சொல்வது சரியல்ல. தற்போது தனித்தனியாக நாங்களாகவே நிலங்களை ஓட்டி வருகிறோம்.

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யாருடைய ஆலோசனையின் பெயரிலும் பிரித்து ஒட்டவில்லை. அவரவர்கள் ஒட்டும் நிலங்களுக்கு அவரவர்கள் முட்டுவலி செலவு செய்கிறார்கள்."

18. So it is evident that the plaintiff is enjoying his portion independently and getting income from the same. Similarly, the defendant is also enjoying his portion of the suit property and deriving income from the same. In such circumstances, there cannot be any joint family nucleus in the hands of the defendant. The plaintiff derives income from the portion in his occupation and utilising the same. Similarly, the defendant derives income from the property under his occupation and utilise the same. Admittedly, the third and fourth item of the property are in the name of the defendant. There is nothing on record to show that the property namely item Nos.3 and 4 were purchased out of the joint family nucleus. Further, the plaintiff and the defendant were not in joint enjoyment of the disputed property. They were not living together and having a common mess. They were living apart and were maintaining their respective family. In such view of the fact the defendant cannot be termed as a kartha as stated by the plaintiff. The oral partition of the year 1975 alleged by the defendant was not proved. In such view of the fact, it is apparent that item Nos.3 and 4 of the suit properties were purchased out of the self acquired property of the defendant. The lower Court also rightly held that item Nos.3 and 4 of the suit property are the self acquired property of the defendant. The findings of the lower Court in this regard is in order. It does not require any interference. Hence, these points are answered accordingly.

Point No.6:-

19. In view of the findings rendered in the above points, I am satisfied that the finding of the lower Court in dismissing part of the claim is in order. It does not require any interference. Hence, this point is answered accordingly.

Point No.7:-

20. In view of the findings rendered at point No.1, I hold that the finding of the lower Court in rejecting the suit is not in order and the same required interference. Hence, the finding of the lower Court in decreeing the suit in O.S.No.448/1983 is set aside and the suit is dismissed. However, the parties have to bear their respective costs.

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21. In the result, A.S.No.917 of 1991 is dismissed. Transfer Appeal No.508 of 1997 is allowed and the judgment and decree in O.S.No.184/1987 is set aside and the suit is dismissed. However, the parties have to bear their respective costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

kb

To

1. The Subordinate Judge
Gobichettipalayam.

2. The Section Officer,
VR Section, High Court, Madras.

1 cc to Mr.A.K. Kumarasamy, Advocate, SR. 8388
1 cc to mr.M. Duraiswamy, Advocate, Sr. 8163

A.S.NO.917 OF 1991 &
TRANSFER APPEAL
NO.508 OF 1997

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